No. 20,966

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD L. CHARTRAND,
Appellant,

vs.

BARNEY'S CLUB, INC., a Nevada corporation,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

Complaint was filed by Barney's Club, Inc., plaintiff against Richard L. Chartrand, defendant, in the Second Judicial District Court, State of Nevada, In and for the County of Washoe. At said time defendant Chartrand was a resident of and domiciled in the State of California, while plaintiff Barney's Club, Inc. is a Nevada corporation, incorporated in August of 1960. The substance of the complaint was to compel the specific performance of an alleged agreement whereby defendant would transfer 240 shares of Barney's Club, Inc. stock, and all interest (which was disputed) in an additional 15 shares, in return for

$200,000. A counterclaim was filed by Chartrand seeking specific performance of a pre-incorporation contract, whereby plaintiff would issue to defendant an additional 15 shares of capital stock, the value of which is over $10,000.

Upon petition of the defendant (T 2-3) and exhibits attached thereto (T 4-49) the matter was removed to Federal District Court, District of Nevada, pursuant to 28 *U.S.C.* § 1332, on the basis of diversity of citizenship and that the matter in controversy exceeded the sum of $10,000. The plaintiff on motion moved for the dismissal of its complaint for specific performance of its alleged agreement with prejudice and the court so ordered. (T 86) The case was thereafter tried in the District Court upon the counterclaim of Chartrand and judgment was rendered against Chartrand and his request for specific performance was denied. (T 72)

The appeal is taken as a matter of right under the provision of 28 *U.S.C.* § 1291, being an appeal from a final decision of a federal district court.

STATEMENT OF FACTS

This action came on for trial before the Court, sitting without a jury, on November 23 and November 24, 1965, on the issues made by defendant's counterclaim and plaintiff's reply thereto and on December 29, 1965, the Court entered its Findings of Fact, Conclusions of Law and Judgment as follows:

"FINDINGS OF FACT

1. At the time of the commencement of this action and at the time of the removal of this action from the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, to the United States District Court for the District of Nevada, plaintiff, Barney's Club, Inc., was a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business in the State of Nevada; and defendant, Richard L. Chartrand, was a citizen of the State of California. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs. Barney's Club, Inc. was incorporated in August, 1960." (T 67)

"2. In the Summer of 1960, and prior to the incorporation of Barney's Club, Inc., Barney E. O'Malia and Richard L. Chartrand entered into an agreement contemplating the incorporation of Barney's Club, Inc. whereby each of them agreed to contribute $80,000 as an investment in the proposed operation of a casino at Stateline, Nevada, to be known as Barney's Club, and that each of them would receive therefor an equal interest in 51%, or more of the corporation. By virtue of said agreement, defendant was entitled to a 25½% interest in the business." (T 68)

"3. Thereafter, O'Malia made a down payment for real property at Stateline, Nevada, which was subsequently conveyed to the corporation, and paid in monies to the corporation in the total amount of $70,000 and contributed services and made expenditures on behalf of the corporation of the claimed value of $10,000." (T 68)

"4. In November, 1960, Chartrand made his first payment of money to the corporation, and thereafter made additional payments, the last of which, in the sum of $30,000, was made in April, 1961. Chartrand paid a total amount of $80,000 in cash to the corporation." (T 68)

"5. On February 1, 1961, Chartrand made, executed and delivered to the Gaming Control Board of the State of Nevada an Invested Capital Questionnaire signed and sworn to by him in which he claimed a 24% percentage interest in the operation of Barney's Club, Inc. Said document was filed concurrently with an application for a state gaming license made by B. E. O'Malia, as President of Barney's Club, Inc., in which, among the individuals listed as being interested in the operation, was C & O Investment Co., Inc., with a 51% investment in Barney's Club, Inc., parceled among Richard L. Chartrand, 45%; Bernard E. O'Malia, 45%; William F. O'Malia, 5%; and Frances L. O'Malia, 5%, which, derivatively, asserted a 24% interest to Richard L. Chartrand in Barney's Club, Inc. At that time, Chartrand and O'Malia contemplated the incorporation of C & O Investment Co., Inc. to hold their stock interests in Barney's Club, Inc., and Articles of Incorporation for C & O Investment Co., Inc. were filed on March 14, 1961. Said corporation was never fully organized or activated. Thereafter, and on April 11, 1961, Bernard E. O'Malia and Richard L. Chartrand jointly directed a letter to the Gaming Control Board of Nevada, as follows:

'Permission is hereby requested to delete that portion of the application filed February 13, 1961, which reads C & O Investment Co., Inc.

'This corporation will not be formed as contemplated and the applicants will become stockholders in Barney's Club, Inc., dba Barney's Club with beneficial ownership in the latter corporation in the same percentage as they would have held had the C & O Investment Company been incorporated.'" (T 68-69)

"6. In February and March, 1961, the Board of Directors of Barney's Club, Inc. was comprised of Barney E. O'Malia, Frances O'Malia, his wife, and William F. O'Malia, his son. On February 17, 1961, the Board of Directors adopted a resolution approving the issuance of 510 shares of the capital stock of the corporation to C & O Investment Co., Inc. On March 20, 1961, the Board of Directors adopted a resolution rescinding the resolution adopted February 17, 1961, and approving the issuance of capital stock of the corporation as follows: Barney E. O'Malia, 240 shares; Richard Chartrand, 240 shares; Frances O'Malia, 15 shares; William F. O'Malia, 15 shares.

The foregoing are the only corporate minutes relevant to the stock entitlement of Chartrand before a dispute arose with respect thereto. There are no organization minutes recording the corporation's obligation at the time the real property at Stateline, Nevada, acquired for the use of the corporation, was deeded to the corporation." (T 69-70)

"7. Capital stock of the corporation has been issued in accordance with the resolution adopted by the Board of Directors at its meeting on March 20, 1961. Since June, 1961, Chartrand has repeatedly demanded an additional fifteen shares of the capital stock to the end that he

would have received 255 shares, representing 25½% of the total authorized capital stock in accordance with his pre-incorporation agreement with O'Malia." (T 70)

"8. Barney's Club, Inc. now has 20 shares of Treasury Stock and is able to comply with Chartrand's demand for an additional 15 shares." (T 70)

"CONCLUSIONS OF LAW

Insofar as the following Conclusions of Law may be considered findings of fact, and insofar as facts are included in the Conclusions of Law which are not included in the foregoing Findings of Fact, the Court finds such facts to be true in all respects.

1. Prior to incorporation, the promoters of a proposed corporation can act only for themselves and are not agents for the then non-existent corporate entity. Absent an express or implied adoption of a pre-incorporation contract made by a promoter, the corporation is not liable thereon." (T 70)

"2. An adoption of a pre-incorporation agreement may be implied if the evidence shows that the corporation accepted the benefit of the agreement, with knowledge thereof and with the inferred intent that it be bound thereby." (T 71)

"3. There is no credible evidence that Barney's Club, Inc., a corporation, ever assumed or intended to be bound by the pre-incorporation agreement to the effect that O'Malia and Chartrand each receive 25½% of the authorized capital stock of the corporation." (T 71)

"4. The minutes of meetings of the Board of Directors of Barney's Club, Inc. would not be of much evidentiary weight inasmuch as the Board was then composed of O'Malia and members of his immediate family, if the resolutions of the Board then adopted were not corroborated by actions taken in implementation thereof in which Chartrand participated with respect to the applications to the Nevada Gaming Control Board for a gaming license. After the adoption of such resolutions, the applications to the Gaming Control Board and the issuance of stock conformably with the resolution adopted on March 20, 1961, Chartrand paid to the corporation the final installment ($30,000) of his $80,000 pre-incorporation subscription agreement." (T 71)

"5. The foregoing, in summary, is the most persuasive evidence adduced relevant to the responsibility of the corporation for the issuance of shares of its capital stock to O'Malia and Chartrand, respectively." (T 71)

"6. The burden of proof is upon Chartrand to establish that Barney's Club, Inc., a corporation, adopted the pre-incorporation agreement between O'Malia and Chartrand with respect to Chartrand's entitlement to 255 shares of the corporate stock." (T 71)

"7. The evidence hereinabove related creates a substantial uncertainty regarding whether the corporation received monies from Chartrand with knowledge of the pre-incorporation agreement, or whether the corporation adopted such agreement. Chartrand has not sustained the burden of proof in that respect." (T 71-72)

"8. Richard L. Chartrand is not entitled to the issuance to him of an additional 15 shares of the capital stock of Barney's Club, Inc. by reason of the transactions referred to in the evidence and summarized in the foregoing Findings of Fact." (T 72)

JUDGMENT

"IT HEREBY IS ORDERED, ADJUDGED AND DECREED that defendant, Richard L. Chartrand, take nothing by virtue of the counterclaim filed by him praying for the issuance to him of an additional fifteen shares of the capital stock of Barney's Club, Inc.

Dated: December 28, 1965.

Bruce R. Thompson
United States District Judge"

(T 72)

Thereafter on the 10th day of January, 1966, the defendant Chartrand made a Motion to the Court for a new trial and/or to vacate judgment and Motion to make additional Finding of Fact (T 73-85) and subsequently the Court by order (T 87-89) on February 8, 1966, amended the Conclusion of Law and Finding of Fact No. 7 on pages 5 and 6 of the judgment filed December 29, 1966, to read as follows:

"7. The knowledge of Bernard E. O'Malia concerning the terms of the pre-incorporation agreement between O'Malia and Chartrand should be imputed to the corporation, and the plaintiff corporation, at all times pertinent, had knowledge of such agreement. The evidence hereinabove related creates a substantial uncertainty regarding whether plaintiff corporation adopted such agree-

ment. Chartrand has not sustained the burden of proof in that respect and the credible evidence refutes the inference of adoption which would otherwise be justified from acceptance of benefits with knowledge of the agreement." (T 89)

Thereafter on the 9th day of March, 1966, Notice of Appeal and Bond were filed by Chartrand (T 90-91) and the case is before this Court upon such appeal.

ERROR CHARGED

The trial court erred in holding as a matter of law that even though the knowledge of O'Malia, who was a party to the pre-incorporation agreement, was imputed to the corporation, which also accepted the benefits thereof, that the corporation did not adopt the contract but only created an "inference" of adoption.

The Court should have found as a matter of law that the corporation was liable on the contract and be instructed to issue the additional 15 shares and all incidents thereof to appellant, pursuant to the pre-incorporation contract.

SUMMARY OF ARGUMENT

The defendant Chartrand is entitled to a decree of specific performance against the plaintiff Barney's Club, Inc. and the delivery of 15 additional shares of capital stock of the corporation for the following reasons:

The Court found as a fact that there was a pre-incorporation agreement between Chartrand and O'Malia that provided each would contribute $80,000 in cash for 255 shares each of capital stock of Barney's Club, Inc. That subsequently O'Malia became the President and guiding spirit of the corporation and a member of the Board of Directors and his wife and son the remaining members of the Board and its officers. That Barney O'Malia received in excess of 255 shares, or 25½% of the capital stock of Barney's Club, Inc., pursuant to the pre-incorporation agreement. 240 shares were taken in Barney O'Malia's name and 30 shares were taken by his nominees, Frances, his wife, and William, his son. Chartrand paid $80,000 in cash to the corporation which was accepted by the corporation with knowledge of the agreement and he received 240 shares of stock therefor but always protested that he was entitled to an additional 15 shares.

The contract was one that the corporation could lawfully make and it accepted the benefits of this contract with knowledge of the contract and cannot now avoid its burdens and the defendant is entitled to full performance of the pre-incorporation agreement and the 15 additional shares of stock and all incidents thereto. Further, that there are 20 shares of stock in the treasury of Barney's Club, Inc.

From the findings of fact made by the Court the burden of proof was sustained by the defendant and the Court erred as a matter of law in not decreeing specific performance of the pre-incorporation contract to Chartrand.

ARGUMENT

IS A CORPORATION BOUND BY A PRE-INCORPORATION AGREEMENT CONTRACTED BY THE PROMOTER WHERE THE PROMOTER UPON INCORPORATION BECAME THE PRESIDENT AND TOGETHER WITH HIS WIFE AND SON, THE ENTIRE BOARD OF DIRECTORS, THUS IMPUTING KNOWLEDGE OF THE TERMS OF THE CONTRACT TO THE CORPORATION, WHICH THEREAFTER ACCEPTED ITS BENEFITS?

Chartrand and O'Malia, promoters of Barney's Club, Inc. entered into a pre-incorporation agreement whereby each would invest $80,000 in the corporation, and each would receive an equal share of 51% or 25½% in the stock of the corporation. Finding of Fact No. 2. (T 68)

The Court below has held in its Conclusions of Law and additional Finding of Fact No. 7 amended, that the knowledge of O'Malia as to the terms of the contract has been imputed to the corporation and that at all times pertinent the corporation had knowledge of the agreement. (T 89)

The Court also found that Chartrand paid into the corporation, after its incorporation, the $80,000 agreed upon in the pre-incorporation contract. Finding of Fact No. 4 (T 68) Conclusions of Law No. 4 (T 71). The Court found that adoption of the contract by the corporation may be implied where the corporation has accepted the benefits of the agreement with knowledge of its terms. Conclusion of Law No. 2 (T 71) But the Court found that the corporation has not adopted the agreement because it did not find credible evidence that Barney's Club, Inc. had ever assumed or intended to be bound by the agreement. Conclusion of Law No. 3 (T 71)

PROMOTERS OR PERSONS WHO CONTEMPLATE ORGANIZING A CORPORATION, CAN MAKE CONTRACTS WHICH WILL BIND THE CORPORATION AFTER IT BECOMES A LEGAL ENTITY.

It may be assumed as true that promoters and incorporators have no standing in any relation of agency, since that which has no existence can have no agent, and, in the absence of any act authorizing them so to do, can enter into no contract, nor transact any business, which shall bind the proposed corporation after it becomes a distinct entity; but, notwithstanding this to be true, still such promoters and incorporators may, acting in their individual capacities, make contracts in furtherance of the incorporation, and for its benefit, and, after the incorporation comes into being as an artificial person under the forms of law, it may, at least under the weight of American authority, accept and adopt such contracts, and thereupon they become its own contracts, and may be enforced by or against it. This the corporation may do, not because of an agency, on the part of the incorporators, before the existence of the entity, for there is none, but because of its own inherent powers as a body corporate to make contracts. *Wall v. Niagara Mining & Smelting Co. of Idaho,* 20 Utah 474, 59 P. 399; *H. Horowitz v. Weehawken Trust & Title Co.,* 10 N.J. Mis. R. 417, 159 A. 384.

This is especially true when the acts of promoters are made with incorporation in mind and that the acts are in furtherance of the corporate purpose and the corporation actually comes into existence. *Brace v. Oil Fields Corporation,* 173 Ark. 1128, 293 S.W.

1041; *New England Oil Refining Co., et al. v. Wiltsee,* 3 F.2d 424.

The courts have generally held corporations to be liable on contracts of the promoters on the theory of ratification, novation, adoption or a continuing offer to be accepted or rejected by the corporation when it comes into being and upon acceptance becomes a contract on its part. Liabilities have also been sustained on the ground that the corporation by accepting the benefits of a contract takes it *cum onere* and is estopped to deny its liability thereon. 123 *A.L.R.* 726, 728.

This principle is well settled in Nevada. *Alexander v. Winters,* 23 Nev. 475, 49 P. 116, rehearing denied 24 Nev. 143, 50 P. 798.

THE CONTRACT MUST NOT BE ULTRA VIRES BUT MUST BE LEGAL AND ONE THAT THE CORPORATION HAS THE AUTHORITY TO MAKE.

Promoter's contract becomes corporation's contract if it expressly or impliedly ratified or adopted after incorporation if within its charter powers. *H. Horowitz v. Weehawken Trust & Title Co.,* 10 N.J. Mis. R. 417, 159 A. 384; *Harris Tourist Bed Co. v. Whitbeck,* 147 Okla. 109, 294 P. 800.

Nevada Revised Statutes 78.210 provies as follows:

> "1. Any corporation existing under any law of this state may issue stock for labor, services, or personal property, or real estate or leases thereof. The judgment of the directors as to the value of

such labor, services, property, real estate or leases thereof, shall be conclusive as to all except the then existing stockholders and creditors, and as to the then existing stockholders and creditors it shall be conclusive in the absence of actual fraud in the transaction.

2. Any and all shares issued for the consideration prescribed or fixed, in accordance with the provisions of this section shall be fully paid."

WHERE THE CORPORATION KNOWS OF THE TERMS OF THE AGREEMENT AND ACCEPTS THE BENEFITS THEREOF, IT HAS IMPLIEDLY ADOPTED THE PREINCORPORATION AGREEMENT AS ITS OWN, AND MUST BEAR THE BURDENS AS WELL AS THE BENEFITS OF THE CONTRACT.

Typical of the holdings of courts in this regard is this statement in *Wall v. Niagara Mining & Smelting Co. of Idaho,* 20 Utah 474, 475, 59 P. 399, 400:

". . . (P)romoters and incorporators may, acting in their individual capacities, make contracts in furtherance of the incorporation, and for its benefit, and, after the incorporation comes into being as an artificial person under the forms of law, it may, at least under the weight of American authority, accept and adopt such contracts, and may be enforced by or against it."

Other cases holding squarely in this point are: *H. Horowitz v. Weehawken Trust & Title Co.,* 10 N.J. Mis. R. 417, 159 A. 384; *New England Oil Refining Co., et al. v. Wiltsee* (1st Cir.), 3 F.2d 424; *Harris Tourist Bed Company et al. v. Whitbeck,* 147

Okla. 109, 294 P. 800; *Morgan v. Bon Bon Co.,* 222 N.Y. 22, 118 N.E. 205; *Conway v. Marachowsky et al.,* 260 Wis. 540, 55 N.W.2d 909; *Lowther v. Blair Distilling Co.,* 266 Ky. 428, 99 S.W.2d 204; *Taylor Engines v. All Steel Engines* (9th Cir.), 192 F.2d 171. See also collection of cases in 18 *Am. Jur.*2d, Corporations, § 122 p. 664, note 3. This rule is affirmed in *Alexander v. Winters,* 23 Nev. 475, 49 Pac. 116, rehearing denied 24 Nev. 143, 50 P. 798, in which the Court states:

> "The liability does not rest upon any supposed agency of the promoters, but upon the immediate and voluntary act of the corporation. If the contract is within the corporate powers, the corporation may, when organized, expressly or impliedly, assume the responsibility of the same, and thus make it a valid obligation of the company. This is especially true if the agreement appears to be a reasonable means of carrying out any of the corporate powers or authorized purposes."

The rule stated in *Murry v. Monter et al.,* 90 Utah 105, 107, 60 P.2d 960, 962, the only case cited by the court below in its Order on defendant's Motion for a New Trial and/or to Vacate Judgment and Motion to Make Additional Finding of Fact (T 89), is as follows:

> "The rule is quite uniform that if a corporation with knowledge of a contract accepts the benefits thereof it will be required to perform the obligations. *Gardiner v. Equitable Office Bldg. Corp.* (C.C.A.) 273 F. 441, 17 A.L.R. 431."

NO FORMAL RATIFICATION OR ADOPTION IS NECESSARY TO BIND THE CORPORATION.

The court below in its Conclusions of Law and Additional Finding of Fact No. 7 amended, states:

> "The knowledge of Bernard E. O'Malia concerning the terms of the pre-incorporation agreement between O'Malia and Chartrand should be imputed to the corporation, and the plaintiff corporation, at all times pertinent, had knowledge of such agreement. The evidence hereinabove related creates a substantial uncertainty regarding whether plaintiff corporation adopted such agreement. Chartrand has not sustained the burden of proof in that respect and the credible evidence refutes the inference of adoption which would otherwise be justified from acceptance of benefits with knowledge of the agreement." (T 89)

The trial court in spite of its express finding that full knowledge of the pre-incorporation agreement was imputed to the corporation (T 89) and its further finding that Chartrand had fully performed thereunder by the payment of $80,000 to the corporation, Finding of Fact No. 4 (T 68), which accepted the money without reservation apparently held that these facts created only an "inference" of corporate acceptance (T 89), rather than the direct proof of acceptance by the corporation. In this appellant urges the trial court erred.

It is well settled that under these circumstances the acceptance by the corporation of the benefits of a pre-incorporation agreement with knowledge of its terms creates a binding and enforceable agreement

between the corporation and the other party to the contract. No formal ratification, adoption or acceptance is necessary. *Wall v. Niagara Mining & Smelting Co. of Idaho,* 20 Utah 474, 59 P. 399; *Seymour v. Association,* 144 N.Y. 333, 39 N.E. 365, 26 L.R.A. 859; *Graham v. First National Bank of Dickinson,* 175 F. Supp. 81; *In Re Super Trading Co.,* 22 F.2d 480.

The rule as followed in Nevada in *Alexander v. Winter,* 23 Nev. 485, cogently states:

> "It is a well-settled proposition of law that a corporation may ratify an agreement made by its promoters. Such ratification may be implied from the acts of the corporation without an express acceptance.
>
> The liability of the corporation under these circumstances does not rest upon a supposed agency of the promoters, but upon the immediate and voluntary act of the company. If the contract is within the corporate powers of the corporation, it may, when organized expressly or impliedly assume the responsibility of the same, and thus make it a valid obligation of the corporation. This is especially true if the agreement appears to be a reasonable means of carrying out any of the corporate powers or authorized purposes . . ." (Citing many authorities.)

The case of *Murry v. Monter et al.,* 90 Utah 105, 107, 60 P.2d 960, 962, cited by the trial judge in his order to vacate the judgment, new trial and for additional findings of fact (T 89) as apparent authority for the trial court's decision, does not state a contrary

principle. In fact the case is in full accord with the authorities herein set forth. In *Murry,* Supra, the Court states at 60 P.2d 962:

> "The rule is succinctly stated in 4 Cook on Corps. (8th Ed.), § 707, p. 2894 'A corporation accepting the benefits of the contract of its incorporators must accept the burden, and a promoter's contract which has been ratified or adopted by the corporation, *or the benefits of which have been accepted by the corporation with knowledge of such contract,* may be enforced against it.' " (Emphasis added)

Therefore, by the express findings of the trial court the agreement sought to be enforced by appellant was accepted and became binding upon the corporation upon the acceptance of the $80,000 paid by Chartrand. The corporation thereupon became obligated to deliver 255 shares of corporate stock to Chartrand. Appellant Chartrand has met his full burden of proof by the trial court finding establishment of the agreement; the knowledge of the corporation, Finding of Fact No. 2 (T 68) the full performance by Chartrand by his payment of $80,000 to and accepted by Appellee corporation, Finding of Fact No. 4 (T 68); the breach of agreement by Appellee in that only 240 shares were issued to Chartrand, Finding of Fact No. 6 (T 69).

THE CONTRACT IS ONE THAT MUST BE ENFORCED IN ITS ENTIRETY OR NOT AT ALL AND THE CORPORATION COULD NOT ALTER THE TERMS OF THE ORIGINAL AGREEMENT.

The rule is specifically stated in *H. Horowitz v. Weehawken Trust and Title Co.,* 159 A. 384, 386 wherein it is stated:

> "Whether we call the act by which the corporation becomes bound upon such contracts a ratification or an adoption thereof, it is well settled that, by voluntarily accepting the benefits accruing thereunder, after full knowledge, and having full liberty to decline the same, the corporation is regarded as adopting the contract *cum onere,* taking the burdens thereof, with the benefits. *Seacoast R. Co. v. Wood,* 65 N. J. Eq. 530, 56 A. 337; 14 *C.J.* 259, 260; 17 *A.L.R.* 477, annotation. This principle is but the adaptation of the well-recognized rule of the law of agency to the law of corporations that, where a principal *has an election either to repudiate or to ratify an unauthorized act of an agent on his behalf, he cannot, without the consent of the other party to the transaction, ratify in part or repudiate in part, but must either repudiate or ratify the whole transaction.* He cannot ratify that part which is beneficial to himself and reject the remainder, but with the benefits he must take the burden. Thus a principal cannot ratify a contract made for him by an agent without also ratifying and becoming bound by the terms and conditions, although unauthorized, upon which it was made, or without ratifying the representations and warranties, and all other instrumentalities employed by the agent as an inducement to bring about the

contract. 2 *C.J.* 481, 482; *Bodin v. Berg,* 82 N.J. Law 662, at page 669, 82 A. 901, 40 L.R.A. (N.S.) 65, Ann. Cas. 1913D, 721.

So it must naturally follow that, while a corporation may adopt a contract made by another in its name before its incorporation, nevertheless in so doing it cannot adopt a part thereof which may be beneficial or desirable and discard that which is not, without the consent of the other party to the contract. Even in those jurisdictions which look upon the act of the corporation in accepting such a contract, not as a ratification thereof, because of the absence of agency, but rather as an adoption in the nature of a novation, or the making of a new contract by the corporation as of the date of the adoption, the ordinary rules of contract law must apply. 14 *C.J.* pp. 262, 263, §§ 294, 296. Hence, if the acts of the promoters of a corporation in making a contract for it before its organization are to be considered in the nature of a proposal to the future corporation for a contract, so that a binding engagement with the corporation will arise when it accepts the same after it has been fully organized, such acceptance must naturally be of the whole contract, as otherwise there would be no meeting of the minds essential to a binding legal engagement. 14 *C.J.* p. 263, § 296."

This proposition is also affirmed in *Alexander v. Winters,* 23 Nev. 475, 486, 49 P. 116, rehearing denied 24 Nev. 143, 50 P. 798.

"A person shall not be allowed at once to benefit by or repudiate an instrument, but, if he

chooses to take the benefit which it confers, he shall likewise take the obligations or bear the onus which it imposes . . ."

Other cases squarely in point are: *Seymour v. Association,* 144 N.Y. 333, 39 N.E. 365, 26 L.R.A. 859. *In Re Super Trading Co.,* 22 F.2d 480.

CONCLUSION

In view of the foregoing the decision of the lower court denying equitable relief to the Appellant should be reversed and the trial court directed to deliver to Appellant Chartrand an additional fifteen (15) shares of stock of Barney's Club, Inc. and all of the incidents thereof.

Dated, Reno, Nevada,
August 26, 1966.

Respectfully submitted,
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Certificate

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance therewith.

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